RAHMAD SHAHRIL IBRAHIM v. PP

HIGH COURT MALAYA, ALOR SETAR
CHOO KAH SING JC
[CRIMINAL APPEAL NO: 41S-18-04-2014]
22 MARCH 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 12(2) – Possession of 7.10g of methamphetamine – Prosecution led two different sets of evidence which contradicted each other – Discrepancy between witness's contents in police report and oral evidence in court – Whether appellant's act of escaping while being handcuffed raised inference of having knowledge of drugs – Whether version accepted by trial court misconceived – Whether inconsistency and discrepancy of evidence went to root of prosecution's case – Whether wrong standard of proof applied – Whether safe to record conviction*

CRIMINAL PROCEDURE: *Prosecution – Witness – Conflicting evidence – Discrepancy between contents in police report and oral evidence in court – Whether inconsistency and discrepancy of evidence went to root of prosecution's case – Whether version accepted by trial court misconceived – Whether evidence trustworthy and reliable – Whether evidence led by prosecution carefully and critically examined by trial court – Whether safe to record conviction*

EVIDENCE: *Witness – Conflicting evidence – Prosecution witness led two different sets of evidence which contradicted each other – Discrepancy between contents in police report and oral evidence in court – Whether inconsistency and discrepancy of evidence went to root of prosecution's case – Whether version accepted by trial court misconceived – Whether evidence trustworthy and reliable – Whether evidence led by prosecution carefully and critically examined by trial court – Whether safe to record conviction*

The appellant was charged under s. 12(2) of the Dangerous Drugs Act 1952 for having in his possession, 7.10g of methamphetamine. It was the prosecution's case that the drugs were found in the appellant's house with the presence of the appellant in a room. It was alleged that the appellant's national identity card together with the drugs were found inside a black bag and the raiding officer ('SP4') seized the incriminating items found in the room. SP4 later lodged a police report ('P14') in relation to the incident. SP4 testified in court that the appellant tried to escape while being handcuffed on the way out of the house. However, in P14, it was stated that the appellant tried to escape when SP4 was about to arrest the appellant. The Magistrate's Court sentenced the appellant to 27 months' imprisonment and three strokes of whipping. The Magistrate accepted the version that the appellant tried to escape after he was handcuffed when he was on his way out from the house. The Magistrate was satisfied that the act of escaping while being handcuffed raised an inference that the appellant had knowledge of the drugs found in the bag. Dissatisfied, the appellant appealed to this court.

Held (allowing appeal; setting aside decision of the Magistrate's Court):

(1) When a police witness says something that is not inherently improbable, his/her evidence must, in the first instance, be accepted. On the facts, SP4 testified that the appellant tried to escape while being handcuffed and on the other hand, *vide* P14, she stated that the appellant tried to escape before being apprehended. The inconsistency and discrepancy of the evidence goes to the root of the prosecution's case. Further, the contradictory evidence goes to prove whether or not the appellant had knowledge of the incriminating drugs found in the black bag. (paras 8, 9, 14 & 24)

(2) In order to secure a conviction, the prosecution had to prove that the appellant was in custody or control of the incriminating drugs as well as the appellant had knowledge of the incriminating drugs. The Magistrate had misdirected herself by making an inference of the appellant's knowledge of the incriminating drugs. The Magistrate was of the view that the act of escape was an act of afterthought in which one could make an inference on the appellant's knowledge of the drugs discovered in the bag. The appellant had already been informed about the drugs before he tried to escape. The act of escape could be done for any reason. One plausible reason could be that the appellant was scared of being implicated to be in possession of the drugs which he was not the owner, since he was a user himself. Hence, the version accepted by the Magistrate was misconceived. (paras 14, 17 & 18)

(3) In relation to the version as found in P14, *ie*, that the appellant tried to escape before he was arrested or handcuffed, the act of escape in that situation was spontaneous and it would have been more probable for an inference to be made that the appellant had knowledge of the drugs found in the bag. However, this version of the narrative was not accepted by the Magistrate. No explanation was offered in the Magistrate's judgment as to why there was a discrepancy between the contents of P14 and the oral evidence of SP4. When the prosecution led two different sets of evidence which were contradictory with each other, it would result in there being no evidence that is trustworthy and reliable before the court. Therefore, it was unsafe to record a conviction. (para 19)

(4) The Magistrate had applied the wrong standard of proof in the appellant's case at the close of the defence. No presumption of law was invoked against the appellant. Therefore, the burden of proof on a balance of probabilities did not arise in the appellant's case. At the end of the Magistrate's judgment, it was stated that the defence had failed to raise a reasonable doubt. There were two standards of proof relied on and placed on the appellant in a single judgment. This was a serious miscarriage of justice on the part of the trial court. (paras 21 & 23)

Case(s) referred to:
Gunalan Ramachandran & Ors v. PP [2006] 1 CLJ 857 FC ***(refd)***
Kofri Mustafar v. PP [2010] 9 CLJ 519 CA ***(refd)***
PP v. Kua Tiong Ann [2009] 1 LNS 195 HC ***(refd)***
PP v. Mohamed Ali [1962] 1 LNS 129 HC ***(refd)***
Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 12(2)
Penal Code, s. 84

Other source(s) referred to:
Sarkar on Evidence, 15th edn, p 112

For the prosecution - Nuur Hafiedzah Md Daud; DPP
For the appellant - Leonard Raj; M/s R Nethaji Rayer & Co

Reported by Kumitha Abd Majid

JUDGMENT

Choo Kah Sing JC:

Introduction

[1] The appellant was charged under s. 12(2) of the Dangerous Drugs Act 1952 (DDA) for being illegally in possession of 7.10g of methamphetamine. He was convicted for the offence charged and sentenced to 27 months of imprisonment and three strokes of whipping by the Magistrate's Court on 19 March 2014. The appellant was not satisfied with the decision of the Magistrate's Court and filed this appeal to the High Court. This court held the appeal was allowed and the conviction was set aside; the appellant was discharged and acquitted. The grounds of the decision of the High Court are as below.

Salient Facts

[2] On 17 January 2013, based on information received, SP4 (the complainant and raiding officer) together with 14 other police officers raided the appellant's house around 6.45pm. SP4 and three other officers went into the appellant's house, whereas the rest were guarding outside. The house was not locked when SP4 and other officers went into the house. SP4 saw the appellant's wife and children watching TV at the hall when she went into the house.

[3] When SP4 asked the appellant's wife where the appellant was, the wife did not answer and was stunned. She and other officers proceeded to search for the appellant in the house. The officers found the appellant in one of the rooms. They found him standing in the middle of the room. No one else was inside the room other than the appellant. They searched the room and found a black bag resting on a table at one of the corners in the room. Upon searching the bag, the police found four packets of transparent plastic bags believed to be 'syabu' inside the bag. It was alleged that the appellant's

national identity card was also found inside the black bag together with the incriminating drugs. The appellant was arrested. SP4 seized the incriminating items found in the room. The appellant was brought to the IPD Bandar Baharu Serdang for further investigation.

[4] The incriminating drugs was later confirmed by a chemist, SP3, to be methamphetamine with a nett weight of 7.10g (see chemist report marked as exh. P11 at p. 94 appeal records). The appellant was charged for being illegally in possession of dangerous drugs and was eventually convicted at the Magistrate's Court.

The Grounds Of Appeal And The Findings Of The Court

[5] The appellant's counsel submitted on three main grounds for the appeal. Broadly speaking, they concern, firstly, the credibility of the evidence of SP4; secondly, the IC found in the black bag; and lastly adverse comments and criticism made by the Magistrate against the appellant's case at the lower court. This court finds the most prevailing grounds in this appeal is the first ground, because it strikes at the core of the prosecution's case.

[6] In order to appreciate the first ground of the appellant's appeal, it is necessary to reproduce the relevant excerpt of the note of proceedings. The relevant part of the note of proceedings pertaining to SP4's oral evidence is as follows:

TPR: Inspektor Laila ada buat repot. Kalau dirujuk semula boleh camkan?

J: Bandar Baharu Repot 73/2013 - saksi camkan - Ya Tuan, ini adalah repot yang saya buat - pohon ditandakan sebagai P-14.

TPR: Inspektor Laila - masih ingat lagi isi kandungan repot Bandar Baharu 73/2013 yang di buat?

J: Ya saya masih ingat lagi.

TPR: Inspektor Laila ada mengadu semasa hendak melakukan tangkapan, saspek ada cuba larikan diri dan ada pengelutan tetapi berjaya ditangkap semula dan saspek alami luka di bahagian bahu kiri dan dahi. Bila kejadian itu berlaku?

J: Kejadian berlaku sejurus kami bawa OKT keluar dari pintu rumah - dalam keadaan bergari beliau cuba larikan diri - bergari dengan keadaan tangan ke belakang.

TPR: Berapa jauh beliau lari?

J: Dari pintu rumah kedudukan saya sekarang, ke kedudukan pintu depan Mahkamah. Dalam lebih kurang 100 meter lebih - dari pintu rumah ke pintu mahkamah - lebih kurang 30 ke 40 kaki.
(see pp. 25-26 of the appeal records)

[7] In SP4's report (P14), the relevant part is as follows:

... SEMASA HENDAK MELAKUKAN TANGKAPAN, SUSPEK CUBA MELARIKAN DIRI DAN BERLAKU PENGELUTAN TETAPI BERJAYA DITANGKAP SEMULA. SUSPEK MENGALAMI LUKA

KECIL DI BAHAGIAN BAHU KIRI DAN DI DAHI ATAS KENING SEBELAH KIRI. SAYA TANGKAP SUSPEK DAN RAMPAS BARANG KES SERTA BAGI TAHU SEBAB-SEBAB TANGKAPAN KEPADA SUSPEK DALAM BAHASA YANG MUDAH DIFAHAMI DAN ...
(see p. 97 of the appeal records)

[8] Based on the oral evidence of SP4 in court, she testified that the appellant tried to escape while being handcuffed on the way out of the house. It is generally accepted that when a police witness says something that is not inherently improbable, his/her evidence must in the first instance be accepted (see *PP v. Mohamed Ali* [1962] 1 LNS 129; [1962] MLJ 258). However, in her police report (P14), she stated that the appellant tried to escape when she was about to arrest the appellant.

[9] There is a glaring contradiction in the evidence before the trial court. On one hand, SP4 testified that the appellant tried to escape while being hand-cuffed, on the other hand, SP4 stated the appellant tried to escape before being apprehended (semasa hendak melakukan tangkapan), which means the appellant was not yet handcuffed. According to SP4's testimony, she instructed Lans Koperal Abdul Fareed Bin Idrus to handcuffed the appellant (see p. 24 of the appeal records). So, did the appellant try to escape before or after he was handcuffed? There are two versions of the story.

[10] In the High Court decision in the case of *PP v. Kua Tiong Ann* [2009] 1 LNS 195; [2009] 7 AMR 788, Vernon Ong Lam Kiat JC (as he then was, now JCA) at p. 808, stated as follows:

In this regard it is also trite that where the prosecution has led two conflicting versions on a particular material aspect, each striking out the other, then the evidence is unreliable or untrustworthy.

[11] In the later part of His Lordship's judgment, it stated as follows:

In *Adzhaar B Ahmad & Anor v. PP* [1996] 4 MLJ 85 the High Court considered the effect of two sets of evidence led by the prosecution which were contradictory to each other. Alauddin J (now PCA) held at p. 93:

By introducing P15A and B, the prosecution had without doubt, led two sets of evidence which were contradictory with each other. What then would be the effect of such contradiction? It would inevitably show that the evidence is unreliable and the result is that the court would be left with no trustworthy evidence upon which the conviction could be based. My finding finds support in the case of *PP v. Lee Eng Looi* [1993] 2 MLJ 322. The learned Vincent Ng JC (as he then was) in the course of his judgment at p. 333 had this to say:

The function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose, the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found [*sic*] the conviction of the accused and to

A hold that he is guilty of the offences with which he is charged. If in a case the prosecution leads two set of evidence, each one which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the
B accused would have the benefit of such a situation.

[12] The case of *PP v. Kua Tiong Ann* clearly explains that when there are two sets of evidence contradicting one another, this leaves the court with no trustworthy or reliable evidence.

C **[13]** In this instant case, which of these two versions of the story is true has serious repercussions on the outcome of the inference of knowledge of the appellant of the incriminating drugs. The inference goes to prove one of the ingredients of the offence charged, which is necessarily to establish the guilt of the appellant.

D **[14]** In order to secure a conviction of the offence charged in this instant case, the prosecution needed to prove that the appellant was in custody or control of the incriminating drugs as well as the appellant had the knowledge of the incriminating drugs. The contradictory evidence highlighted above goes to prove whether or not the appellant had knowledge of the incriminating
E drugs found in the black bag. The discrepancy here relates to a very material aspect of the case. It goes to the root of the matter. It is not pertaining to insignificant aspects which may be justified in seeking advantage of the incongruities obtaining in the evidence. When the discrepancy goes to the root of the matter no such benefit is available (see *Gunalan Ramachandran & Ors v. PP* [2006] 1 CLJ 857; [2006] 2 MLJ 197, p. 206, referring to *Sarkar*
F *on Evidence* (15th edn) p. 112)

[15] The Magistrate in her judgment accepted the version that the appellant tried to escape after he was handcuffed when on the way out of the house (see p. 59 of the appeal records). The Magistrate did not give any reason why she preferred this version. The Magistrate was satisfied the act of escaping while
G being handcuffed raised an inference that the appellant had the knowledge of the drugs found in the bag (see pp. 64, 72 of the appeal records).

[16] I think the Magistrate has misdirected herself on the finding of knowledge of the appellant based on this version of the narrative. The
H Magistrate stated as follows:

> Dengan perlakuan OKT yang cuba melarikan diri ketika diiringi keluar rumah oleh pegawai serbuan menunjukkan OKT tahu dan sedar bahawa beliau memiliki barang yang salah disisi undang-undang i.e. dadah berbahaya. Perbuatan melarikan diri selepas digari dan diiringi oleh SP-4 dan 2 anggota serbuan yang lain keluar rumah bukanlah satu perbuatan
I yang spontan pada pendapat Mahkamah, kelakuan yang spontan adalah satu tindakan drastic. Namun perbuatan melarikan diri selepas digari dan diiringi keluar rumah adalah satu perbuatan 'afterthought' OKT yang boleh dibuat inferens disini bahawa OKT berpengetahuan bahawa beliau memiliki barang salah iaitu dadah yang dijumpai dalam beg tersebut.

[17] The Magistrate was of the view that the act of escape was an act of 'afterthought' on which she found that one could make an inference on the appellant's knowledge of the drugs discovered in the bag. The appellant was already handcuffed and ought to have been told why he was being arrested, that is he would have been told that the drugs were found in the black bag together with his identity card in it. How could that act of escape now translate into an inference that the appellant had knowledge of the drugs? He had already been informed of the drugs before trying to escape. The act of escape, in my opinion, could be for any reason. One plausible reason could be that the appellant was scared of being implicated to be in possession of the drugs which he was not the owner, because he was a user himself (urine tested positive - see additional charge p. 4 of the appeal records).

[18] This court is of the considered view that the version of the story accepted by the Magistrate was misconceived. The Magistrate gravely misdirected herself on the making of an inference of the appellant's knowledge of the incriminating drugs.

[19] In the second version of the narrative, which is found in the report, that the appellant tried to escape before he was arrested or handcuffed, the act of escape in that situation was spontaneous and it would have been more probable for an inference to be made that the appellant had knowledge of the drugs found in the bag. But, this version of the narrative was not accepted by the Magistrate. No explanation was offered in the Magistrate's judgment as to why there was a discrepancy between the content of the report (P14) and the oral evidence of SP4. When the prosecution has led two different sets of evidence which are contradictory with each other, that would result in there being no evidence that is trustworthy and reliable before the court, therefore, it is unsafe to record a conviction.

[20] A serious miscarriage of justice has been found in the judgment of the Magistrate's Court. On this ground alone, the conviction of the appellant ought to be set aside and the appeal be allowed. It is unnecessary for this court to move on to discuss the second and third grounds of the appeal. As stated earlier, this ground of appeal strikes at the core of the prosecution's case.

[21] This court observes that the Magistrate has also made another grave mistake in her judgment, in that the Magistrate had applied the wrong standard of proof on the appellant's case at the close of the defence (this issue was also raised in the Rekod Petisyen Rayuan Tambahan). The Magistrate stated as follows:

> Secara spesifik, diperingkat pembelaan, beban adalah dibahu pihak pembelaan untuk membawa keterangan atau keterangan pihak pembelaan mestilah mampu menyangkal keterangan *prima facie* pihak pendakwaaan (rujuk kes *Kofri Mustafar v. PP* [2010] 9 CLJ 519).
>
> (see p. 76 of the appeal records)

[22] In the Court of Appeal, in the case of *Kofri Mustafar v. PP* [2010] 9 CLJ 519 the burden of proof was placed on the appellant on a balance of probabilities because the appellant had relied on s. 84 of the Penal Code, the defence of unsound mind. It was held in the case at p. 530 as follows:

> It is established law that the burden of proof lies on the appellant that is if he wishes the court to believe that he was of unsound mind at the time when he committed the offence … Under s. 105 of the Evidence Act, the legal burden is on the appellant to establish the fact that he committed the act in a moment of unsound mind (*Jayasena v. R* [1970] 1 All ER 219). In an English case, *Woolmington v. DPP* [1935] AC 462 the court reiterated that for a defence of insanity, the legal burden of proof on the balance of probability, is placed on an accused person …

[23] In this instant case, no presumption of law was invoked against the appellant, therefore, the burden of proof on a balance of probabilities does not arise in the appellant's case. At the end of the Magistrate's judgment, she stated the defence had failed to raise a reasonable doubt (see p. 82 of the appeal records). There were two standards of proof relied on and placed on the appellant in a single judgment. This is a serious miscarriage of justice on the part of the trial court.

Conclusion

[24] In conclusion, there are lurking doubts that injustice has been done in this case by the trial court. First, the Magistrate did not carefully and critically examine the evidence led in the prosecution's case. She did not take into account the inconsistency or discrepancy of evidence led by the prosecution's case. The inconsistency and discrepancy of the evidence goes to the root of the prosecution's case. The conflicting evidence found in the prosecution is sufficient to give rise to more than a reasonable doubt (see *Yusoff Kassim v. PP* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376; [1992] 2 MLJ 183). On that score, the Magistrate should not have called the appellant to enter his defence. Secondly, assuming the Magistrate was correct in accepting the version of the story that the appellant had tried to escape under handcuffed, the Magistrate's inference of the knowledge of the drugs on the appellant was misconceived. As explained, the inference of knowledge was made by the Magistrate based on an event that happened after he was arrested. Lastly, the Magistrate had committed an error of law in applying two standards of proof at the close of the appellant's case. For these reasons, this court allowed the appeal, set aside the Magistrate's decision and discharged and acquitted the appellant.